Supreme Court, U.S.
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No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Yukon Recovery's Petition does not involve a federal question, Constitutional provision or treaty. Should this case be accepted for review, this Court will be asked, in the absence of the State formerly involved (Alaska) which was dismissed before trial, to render an advisory opinion concerning the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-2106 (1994).

LIST OF PARTIES BELOW

The parties to this case below were Petitioner Yukon Recovery, L.L.C. and Respondent Ocean Mar, Inc.[1]

In the District Court, this matter was a consolidated action. The *in rem* defendants have never appeared or been represented in the courts below.

RULE 29.6 LIST

Ocean Mar, Inc. has no parent companies or subsidiaries.

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[1] In the U.S. District Court for the District of Alaska, Yukon Recovery L.L.C. filed an action entitled "Yukon Recovery, L.L.C., Plaintiff, v. Certain Abandoned Property, *in rem*, Defendant." Appendix to Petition (App. to Pet.) 15a. Ocean Mar, Inc. filed an action of its own. *Id.* The two actions were consolidated and tried together, and the trial judge issued one unified decision. *Id.* In the U.S. Court of Appeals for the Ninth Circuit, the appeal was styled "Yukon Recovery, L.L.C., Plaintiff-Appellant, v. Certain Abandoned Property, *in rem*, Defendant, Ocean Mar, Inc., Claimant-Appellee." 205 F.3d 1189.

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OPINIONS BELOW

The unanimous opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit filed March 7, 2000, *Yukon Recovery, L.L.C. v. Certain Abandoned Property, in rem, Ocean Mar, Inc., Claimant-Appellee,* No. 98-36015 (9th Cir. 2000), is reported at 205 F.3d 1189. Petitioner reprinted it at App. to Pet. 1a.

The judgment and order of the U.S. District Court for the District of Alaska, Chief Judge Holland, presiding, filed August 28, 1998, is reported at 1998 A.M.C. ["American Maritime Cases"] 2884 (D. Alaska 1998) and 1998 WL 965985 (D. Alaska). It also is reprinted at App. to Pet. 15a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and final judgment of the U.S. Court of Appeals for the Ninth Circuit filed March 7, 2000. No petition for rehearing was filed in the Court of Appeals. This Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1), and has admiralty and maritime jurisdiction pursuant to U.S. Const. art. III, § 2, cl. 1.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent believes, as will be seen *infra,* that no constitutional provision or statute is involved in this case.

STATEMENT OF CASE

This marine salvage case concerns ownership interests in the cargo of the passenger steamer SS ISLANDER, which sank in the waters of the Territory of Alaska in 1901. At the time it sank the SS ISLANDER was carrying a cargo of gold belonging to the Canadian Bank of Commerce, being shipped via registered mail. The shipment was insured, and after the sinking the cargo insurer paid a large loss.

After many years of research and investigation, Ocean Mar, Inc., a marine salvage company, mounted a costly expedition in Southeast Alaska. By the use of highly sophisticated modern technology, Ocean Mar was able to locate the remaining parts of the vessel, and her valuable cargo. However, just as Ocean Mar was about to begin recovery of the cargo, further salvage efforts were enjoined by order of the United States District Court for the District of Alaska. A lawsuit had been filed by Petitioner Yukon Recovery L.L.C., seeking title to the cargo of the ISLANDER. Yukon Recovery had only been incorporated by one of its principals, the convicted felon Robert Mester, less than two months before the suit was filed. Yukon Recovery had been surreptitiously provided by a third party with certain confidential business records and research materials belonging to Ocean Mar, which gave the location of the sinking of the ISLANDER. Based upon these wrongly-procured trade secrets of Ocean Mar, Mester incorporated Yukon Recovery and its attorneys raced to court before Ocean Mar was able to bring to the surface any of the gold cargo which it had been the first to locate.

The case was tried before Chief Judge Holland in Anchorage, Alaska, beginning on July 13, 1997. Ocean Mar proved to the satisfaction of the Court how gold from the Yukon Territory was shipped to the coast at Skagway and from there by sea to Seattle or Vancouver. Ocean Mar demonstrated that the Canadian Bank of Commerce owned a large percentage of the gold that was shipped, and how it insured its shipments, which were usually carried as registered mail. Ocean Mar further proved that in all likelihood the insurer was The Marine Insurance Company Ltd. of London, England. The world-wide claims manager of The Marine Insurance Company testified at trial about that company's extensive involvement in insuring registered mail shipments of gold, coins and other high-value cargoes in the late nineteenth and early twentieth centuries. The documentary evidence and testimony at trial convinced the court that The Marine Insurance Company is the subrogated owner of the gold cargo on board the ISLANDER, and that it has not given up those rights. In opposition to the evidence submitted by Ocean Mar, Yukon Recovery was able to produce nothing more than the testimony of a supposed expert, who stated that he did not believe Ocean Mar's evidence.

The decision of the District Court granted Ocean Mar sole rights to salvage the cargo of the ISLANDER, and found The Marine Insurance Company was the subrogated owner of the gold belonging to the Canadian Bank of Commerce. The court further found that Ocean Mar was the first party in modern times to locate the wreckage of the ISLANDER, and accordingly was the "first finder" thereof. The court enjoined Yukon Recovery from any further involvement with the cargo of the

ISLANDER, and dismissed Yukon Recovery's lawsuit with prejudice.

A unanimous panel of the Ninth Circuit Court of Appeals affirmed the trial court's decision. Having submitted no contrary evidence at trial to dispute Ocean Mar's evidence, Yukon Recovery on appeal was forced to argue that the trial court had applied the wrong evidentiary standard. However, since both parties had agreed before trial that the preponderance of the evidence standard should apply, the Court of Appeals rejected Yukon Recovery's position, and affirmed the trial court. The Court of Appeals likewise affirmed the finding that Ocean Mar was the first finder of the cargo, and as such on that basis also was entitled to exclusive salvage rights.

Yukon Recovery has asserted herein that there is confusion in the lower courts concerning when, under the ASA, property is deemed "abandoned". This Court faced that exact issue in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). In that case, Justice O'Connor, in an opinion to which there was no dissent, wrote that "[T]he meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *Id.*, at 508. As recently as two years ago, this Court believed that the term "abandoned" has a known and established meaning under admiralty law. Yukon Recovery has suggested nothing in its Petition to indicate that since that time, the lower courts have introduced any substantial confusion concerning the meaning of that term.[2] Indeed the majority of

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[2] Since treasure salvage cases can involve either modern vessels lost for only a few years, or ancient wrecks hundreds or

the decisions relied upon by Yukon Recovery pre-date this Court's indication in *Deep Sea Research* that the meaning of "abandoned" is clear.

REASONS FOR DENYING THE WRIT

Yukon Recovery asserts that "[T]his Petition involves construction of the Abandoned Shipwreck Act (ASA) of 1987, 43 U.S.C. §§ 2101-2106. . . . "[3] Pet. 2. Yukon Recovery is simply wrong, and Ocean Mar feels compelled, pursuant to Rule 15.2, to advise the Court that the Petition is based upon a fundamental misstatement of fact.

The ASA provides that the United States takes title to an abandoned shipwreck meeting any one of three criteria. 43 U.S.C. § 2105(a). The ASA then immediately passes title from the United States to the State in or on whose submerged lands the shipwreck is located. *Id.*, § 2105(c). Therefore, in any case involving the ASA, an owner of a wrecked ship, a salvor, or a subrogated insurer litigates against the State concerned. *See, California v. Deep Sea Research, Inc.*, 883 F. Supp. 1343 (N.D. Cal. 1995), *aff'd*, 102

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even thousands of years old, such matters (and adjudications concerning them) are of necessity fact-specific. Yukon Recovery acknowledges this. Pet. 19. Overall, however, Justice O'Connor is correct that the meaning of "abandoned" is quite clear: abandonment occurs when title has been affirmatively renounced, or when the factual circumstances (such as the passage of thousands of years) give rise to a clear inference of abandonment (*i.e.*, there is no owner or subrogated insurer to assert a claim of title). *See Deep Sea Research*, 523 U.S. at 499.

[3] The ASA is reprinted in Petitioner's App. to Pet. 31a-36a.

F.3d 379 (9th Cir. 1996), *aff'd in part, vacated on other grounds, and remanded*, 523 U.S. 491 (1998).

In this case, Alaska was not involved in either the trial or the appeal, and had no interest in the outcome of either. On May 2, 1997, several months before the trial, and three years before the appeal was decided, Ocean Mar entered into a settlement agreement with Alaska, in whose waters the wreck of the ISLANDER lies. The agreement, Def. Exh. C5, is reprinted herein at Brief in Opposition Appendix (Opp. App.) 1a-4a. That agreement provides that, with the exception of small amounts of gold which might have been the personal property of passengers on board the vessel, the cargo of gold "[I]s the property of The Marine Insurance Company Ltd., and the State of Alaska claims no ownership or other interest therein." (*Id.* at 2a). Alaska agreed with Respondent that "[T]he ISLANDER carried commercial gold that was insured by The Marine Insurance Company Ltd. The Marine Insurance Company Ltd. paid claims made by the owners of the gold and is now the subrogated owner of the gold shipped aboard the vessel." (*Id.* at 1a).

Similarly, Yukon Recovery entered into its own contract with Alaska. That agreement, which was filed with the court in the form of a stipulation between Yukon Recovery and the State, is reprinted at Opp. App. 5a-12a. After entering into these separate agreements with Ocean Mar and Yukon Recovery, Alaska agreed that it could be dismissed from the litigation, and the trial court so ordered. Interestingly, elsewhere in the trial court and in its agreement with Alaska, Yukon Recovery took exactly the opposite position to that which it is espousing in its Petition. The stipulation restates the parties' positions:

Alaska had asserted that "[U]nder the [ASA], title to any abandoned shipwreck or cargo thereof that is embedded in submerged lands of a state is ceded to that state. . . . [but] Yukon Recovery disagrees with the State's assertions set forth above. . . . " Opp. App. 7a. In the trial court, Yukon Recovery repeatedly denied that the ASA applies, and so advised the District Court again in its stipulation with Alaska. *Id.* Yet Yukon Recovery would now have this Court believe that the ASA is central to a resolution of the dispute concerning the cargo of the ISLANDER, even though Alaska, which would otherwise receive title pursuant to 43 U.S.C. § 2105(c), gave up all of its rights to the cargo, Opp. App. 2a, and has not been a party to the two consolidated lawsuits since before the trial began.

Far from being an ASA case, this is actually an insurance subrogation case. The Court of Appeals referred to The Marine Insurance Company's subrogation rights in two places, 205 F.3d at 1193 and 1194. The District Court specifically referenced the Agreement between Alaska and Respondent; its decision enforces "[T]he rights of the State of Alaska under its contract with Ocean Mar, Inc. . . . " App. to Pet. 28a, to certain historical artifacts (only). While it is true that the Court of Appeals' decision on one page does mention the ASA (205 F.3d at 1196), such reference is solely in dictum, clearly not necessary to the reasoning of the decision. In that reference, the Court of Appeals explains why in general, salvors of wrecks located in state waters cannot with impunity, following the passage of the ASA, conduct freewheeling and expensive salvage operations: they risk losing to the state concerned all right and title to the property they recover.

Therefore they first proceed to court (as the parties did here) for a determination of the legal rights and ownership interests involved.

Because the ASA is neither central to, nor even involved in, the issues which were resolved by the courts below, Yukon Recovery's Petition asks this Court for an advisory opinion.[4] This Court does not render advisory opinions,[5] and therefore this matter is not properly reviewable on a writ of *certiorari*.

1. The Trial Court Resolved A Factual Dispute, And The Court Of Appeals Affirmed

Nowhere does the Petition show "compelling reasons"[6] to grant the writ. The Petition admits that the Ninth Circuit Court of Appeals' decision in this case "[E]ssentially places it in alignment with the Fourth Circuit's express abandonment standard. . . . " Pet. 17. This Court has often noted that it is very important that the Court not grant the writ of *certiorari* except "in cases where there is a real and embarrassing conflict of opinion

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[4] "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson v. Buck*, 313 U.S. 387, 402 (1941).

[5] "We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972); *Flast v. Cohen*, 392 U.S. 83, 99 (1968)." *Princeton U. v. Schmid*, 455 U.S. 100, 102 (1982) (parallel citations omitted).

[6] Rule 10.

and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Since in this case the ASA is not involved, the Petition does not raise any question of law, whether unsettled, important or otherwise. Here, there is no case or controversy involving the ASA.[7]

The Petition argues only that this Court should grant a hearing to consider whether the Court of Appeals was correct in affirming the trial court's factual findings that (1) Ocean Mar is the legitimate contract salvor for the subrogated insurer of the cargo of the ISLANDER, and (2) Ocean Mar was the first finder of that cargo. The Petition does not and cannot contend that the review of those factual decisions would have any significance beyond this case.

"[T]his Court does not sit for the benefit of particular litigants. . . . " *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932) (Frankfurter, J.) Nor is this Court "the place to review a conflict of evidence [or] to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . . " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). *See, e.g., United States v. ITT Continental Baking*

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[7] "Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964), it may not be ignored when inconvenient, *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (moot question cannot be decided, '[h]owever convenient it might be'). . . . " *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S.Ct. 693, 721 (2000) (parallel citations omitted).

Co., 420 U.S. 223, 226-27 n.2 (1974); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-79 (1938), *aff'd on reh'g*, 305 U.S. 124 (1938); *FTC v. Am. Tobacco Co.*, 274 U.S. 543, 544 (1927) (The Court should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. . . . ") Accordingly, the Petition shows on its face that it should be denied.

Moreover: (1) the Court of Appeals was clearly correct on the insurance subrogation and contract salvor issue, based upon the evidence introduced at trial and the evidentiary standard which both parties agreed should be applied; and (2) the Court of Appeals had an independent basis for its ruling which the Petition does not discuss. We turn to these points next; each independently establishes that this Court should deny review.

A. The Courts Below Correctly Held, By The Proper Evidentiary Standard, That Ocean Mar Is The Contract Salvor For The Subrogated Insurer

The trial of this matter in the District Court involved oral and documentary proof by Ocean Mar that The Marine Insurance Company insured the cargo of commercial gold being carried on board the ISLANDER. While Yukon Recovery argued that Ocean Mar's proof was not adequate, the trial court found that it was. On appeal, Yukon Recovery argued that the trial court applied the wrong standard of proof. 205 F.3d at 1193. The Court of Appeals noted that Yukon Recovery's appeal was

addressed to the alleged error of the trial court in applying the preponderance of the evidence standard; significantly, the sufficiency of the evidence supporting the District Court's decision was not challenged on appeal. (*Id.* at 1194, 1195). It is clear from Yukon Recovery's statement in its Petition that Yukon Recovery really seeks a further appeal of the evidentiary findings of the trial court: "[T]he record is devoid of any documentary evidence that gold on board The SS ISLANDER was insured. . . . " Pet. 8. Such factual review is not the province of this Court.

Yukon Recovery states that if a writ of *certiorari* is granted, "[T]he Court will be invited to consider whether special evidentiary rules need to be in place for proof (by a marine insurer) of a subrogation interest in a wreck." Pet. 18. As the Court of Appeals noted, Yukon Recovery itself asked the trial court to apply the usual (preponderance of the evidence) standard, which the District Court then adopted. 205 F.3d at 1193-1194. Yukon Recovery was and is therefore precluded from raising that issue on appeal, either in the Ninth Circuit or before this Court.[8]

B. Yukon Recovery Ignores The Independent Basis For The Decision Below

The Ninth Circuit noted that the trial court found for Ocean Mar on at least two bases: (1) Ocean Mar, as a

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[8] As the Ninth Circuit noted, utilizing the standard which the District Court applied was not error, but if it had been, the error would have been invited. 205 F.3d at 1194.

contract salvor, has the right to recover the cargo of the ISLANDER on behalf of its principal, The Marine Insurance Company, the subrogated insurer, 205 F.3d at 1197; and (2) Ocean Mar was the first in modern times to find the wreck of the ISLANDER, to observe, record and make a timely claim to the wreckage of the ship and its cargo. *Id.* Even if this Court were to do what Yukon Recovery asks, namely to determine as a factual matter that the cargo of the ISLANDER was abandoned and The Marine Insurance Company is not the subrogated insurer thereof, Yukon Recovery cannot prevail. It has not sought review of the trial court's determination that Ocean Mar is the first finder of the cargo. Having abandoned the opportunity to do so,[9] the findings of fact of the District Court at App. to Pet. 22a-24a and the conclusions of law, *Id.*, 28a-29a, that Ocean Mar was the first finder remain fully viable.

If the cargo was abandoned, it all belongs now to Ocean Mar as the first finder, under the well-established law of finds. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 336-7 (5th Cir. 1978), and further proceedings *sub nom. Florida Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982). The agreement between Ocean Mar and Alaska memorializes the relinquishment by the State of all claims to the gold cargo. Opp. App. 2a. ("[T]he State of Alaska claims no ownership or other interest therein.") Yukon Recovery's

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[9] *See, e.g., Stevens v. Dept. of Treas.*, 500 U.S. 1, 8-10 (1991) (Court will not rule on merits of position which litigant has abandoned).

requested relief, Pet. 7 n.2, that the matter be sent back to the District Court, if granted, would be a meaningless act, since that court's finding that Ocean Mar was the first finder would remain intact; Ocean Mar would then still have title to and would be entitled to recover and possess all of the commercial gold cargo. App. to Pet. 28a-29a; 205 F.3d at 1197.

CONCLUSION

For the foregoing reasons, the Petition of Yukon Recovery should be DENIED.

Respectfully submitted,

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